FILED
MAR 7 1980

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1344

MICHAEL M.
Petitioner,

VS.

THE SUPERIOR COURT OF SONOMA COUNTY,
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of California

GREGORY F. JILKA
TERESA DE LA O
245 Southwest Blvd.
Rohnert Park, CA 94928
(707) 795-9569
Attorneys for Petitioner

Dated: February 27, 1980

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7852

SUBJECT INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions involved	2
Statement of the case	4
Reasons for granting the writ	5
Introduction	5
I	
The opinion below justifies and promotes unequal treatment of the sexes under the law and is in direct conflict with the decisions of this court on sex discrimination	6
II	
The constitutional validity of statutory rape laws is a question of national importance which should be decided by this court	11
Conclusion	12

TABLE OF AUTHORITIES CITED

Cases	Page
Carey v. Population Services International, 431 U.S. 678, 52 L.Ed.2d 675, 97 S.Ct. 2010	10
Craig v. Boren, 429 U.S. 190, 50 L.Ed.2d 397, 97 S.Ct. 451	6
Ex Parte Groves (Tex. 1978) 571 S.W.2d 888	11
Frontiero v. Richardson, 411 U.S. 677, 36 L.Ed.2d 583, 93 S.Ct. 1764	6, 9
Griswald v. Connecticut, 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678	10
In Re Interest of J.D.G. (Mo. 1973) 498 S.W.2d 786	11
Meloon v. Helgemoe (1st Cir., 1977) 564 F.2d 602, cert. denied, 436 U.S. 950, 56 L.Ed.2d 793, 98 S.Ct. 2858	9, 11
Michael M. v. Superior Court (Cal. 1979) 25 Cal.3d 608, 601 P.2d 572	1, 5, 7, 8, 9, 10, 11
Muller v. Oregon (1908) 208 U.S. 412, 52 L.Ed. 551, 28 S.Ct. 324	8
Olson v. Nevada (Nev. 1979) 588 P.2d 1018	11
Orr v. Orr, 440 U.S. 268, 59 L.Ed.2d 306, 99 S.Ct. 1102	6, 10
People v. Fauntleroy (N.Y. 1978) 405 N.Y.S.2d 931	11
Reed v. Reed, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251	6, 7
Rundlett v. Oliver (1st Cir., 1979) 607 F.2d 495	11
Sail'er Inn v. Kirby (Cal. 1971) 5 Cal.3d 1, 485 P.2d 529	9
State v. Drake (Iowa 1979) 219 N.W.2d 492	11
State v. Meloon (N.H. 1976) 366 A.2d 1176	11
State v. Rundlett (Maine 1978) 391 A.2d 815	9, 11
State v. Snow (Mo. 1923) 252 S.W. 629	6, 7
State v. Thompson (N.J. 1978) 392 A.2d 678	11

Constitution

United States Constitution, Fourteenth Amendment, section 1	2, 3

Statutes

California Penal Code:	
Section 261	2, 3
Section 261.5	2, 3, 4, 5
Section 262	3
Section 264	2, 3
28 U.S.C. section 1257(3)	2

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No.

MICHAEL M.
Petitioner,

VS.

THE SUPERIOR COURT OF SONOMA COUNTY,
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of California

Petitioner, Michael M., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of California which was entered in this proceeding on November 5, 1979.

OPINION BELOW

The opinion of the Supreme Court of California is reported at 25 Cal.3d 608 and at 601 P.2d 572. The opinion is printed in the Appendix at page A-1.

JURISDICTION

The decision of the Supreme Court of California was entered on November 5, 1979. A Petition for Rehearing was denied on December 5, 1979.[1] This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Whether the prosecution of petitioner, age 17, under California's statutory rape law (Penal Code §§ 261.5, 264) for engaging in sexual intercourse with a sixteen year old female violates petitioner's right to equal protection of the law as guaranteed under paragraph 1 of the Fourteenth Amendment of the United States Constitution where the female can commit no crime under the statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Penal Code § 261.5:

Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.

California Penal Code § 264 (effective until January 1, 1980):

Rape, as defined in Section 261, is punishable by imprisonment in the state prison for three, six, or eight years. *Unlawful sexual intercourse, as defined in Section 261.5, is punishable either by imprisonment in the county jail for not more than one year or in the state prison,* and in such case the jury shall recommend by their verdict whether the

---

[1]The minute order denying the Petition for Rehearing is printed in the Appendix at page A-25.

punishment shall be by imprisonment in the county jail or in the state prison, provided, that when the defendant pleads guilty to an offense under Section 261.5, the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison. (emphasis supplied)

California Penal Code § 264 (operative January 1, 1980):

Rape, as defined in Section 261, is punishable by imprisonment in the state prison for three, six, or eight years. Rape as defined in Section 262, is punishable either by imprisonment in the county jail for not more than one year or in the state prison for three, six, or eight years. *Unlawful sexual intercourse, as defined in Section 261.5, is punishable either by imprisonment in the county jail for not more than one year or in the state prison,* and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail for not more than one year or in the state prison, and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison; provided, that when the defendant pleads guilty to an offense under Section 261.5 the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison. (emphasis supplied)

Section 1 of the Fourteenth Amendment of the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE[2]

A one count Information was filed in the Sonoma County Superior Court on June 27, 1978. The Information alleged that Petitioner "accomplished" an act of sexual intercourse with a 16 year old female in violation of California Penal Code Section 261.5. On July 27, 1978, Petitioner was arraigned on the Information. At that time, Petitioner moved to dismiss the Information on the ground that Penal Code Section 261.5 is unconstitutional in that it violates the equal protection clauses of both the United States and California Constitutions. This motion was denied on August 22, 1978.

On September 6, 1978, a Petition for Writ of Prohibition was filed in the California Court of Appeal, First Appellate District, requesting that the Sonoma County Superior Court be compelled to grant the motion to dismiss. Although the Court of Appeal denied the Writ on September 14, 1978, the Supreme Court of California ordered the Petition transferred to it on October 12, 1978. On October 17, 1978, the Supreme Court of California issued an alternative Writ of Mandate ordering the Sonoma County Superior Court to show cause why it should not be compelled to dismiss the Information.

---

[2]The material facts set forth were admitted in the pleadings filed in the Supreme Court of California.

On November 5, 1979, the Supreme Court of California denied the Writ of Mandate by a narrow majority. Petitioner's Petition for Rehearing was filed on November 19, 1979, and was denied on December 5, 1979.

REASONS FOR GRANTING THE WRIT

Introduction

The Petitioner, Michael, stands before this Court accused of participating in sexual intercourse with Sharon, a sixteen year old female. Michael was seventeen years old at the time of the alleged offense, only one year and 18 days older than Sharon. Under the statute challenged, Sharon has committed no crime while Michael faces the prospect of a felony prison sentence. Michael has questioned this disparate treatment of males and females on equal protection grounds.

In upholding the constitutional validity of California Penal Code Section 261.5 (hereinafter "the statute"), the Supreme Court of California has acknowledged that the statute classifies and discriminates on the basis of sex. The Court justified the discriminatory classification scheme of the statute on the ground that it furthered the State's "compelling interest" in preventing teenage pregnancies. *Michael M. v. Superior Court*, 25 Cal.3d 608, 611, 601 P.2d 572, 574 [Appendix p.A-2]. No justification other than pregnancy prevention has been offered.

It is obvious that the statute discriminates against males. Males face prison sentences for conduct which females engage in with impunity. On closer examination, it is equally apparent that the statutory classification scheme is based upon the outdated stereotype of male supremacy. The

statute challenged is therefore inherently and impermissibly discriminatory to both sexes.

The opinion of the majority of the California Supreme Court is replete with provincial assumptions and inherent sexual prejudices. The majority opinion finds that males are more culpable than females for engaging in non-marital sex. The Court further concludes that contraceptives are of doubtful value in preventing pregnancy. The opinion attempts to confirm inveterate sexual conventions at a time when the courts should be acting to eradicate arrant sexual stereotypes. See *Orr v. Orr*, 440 U.S. 268, 59 L.Ed.2d 306, 99 S.Ct. 1102. *Craig v. Boren*, 429 U.S. 190, 50 L.Ed.2d 397, 97 S.Ct. 451. *Frontiero v. Richardson*, 411 U.S. 677, 684-685, 36 L.Ed.2d 583, 590, 93 S.Ct. 1764. *Reed v. Reed*, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251. This Court should therefore consider the questions presented by this case and dispel the erroneous stereotypes held by the Supreme Court of California.

I

THE OPINION BELOW JUSTIFIES AND PROMOTES UNEQUAL TREATMENT OF THE SEXES UNDER THE LAW AND IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT ON SEX DISCRIMINATION

California's statutory rape law creates an arbitrary irrebutable presumption of male culpability. The statute blames the male even though the female may be older, more mature, or herself the sexual aggressor. The consequences of application of the statute may be completely inequitable. In *State v. Snow* (Mo. 1923), 252 S.W. 629,

632, the Missouri Supreme Court noted the fundamental unfairness of that State's statutory rape law as applied to the record before it:

> This wretched girl was young in years but old in sin and shame. A number of callow youths, of otherwise blameless lives so far as this record shows, fell under her seductive influence. They flocked about her . . . like moths about the flame of a lighted candle and probably with the same result. The girl was a common prostitute . . . The boys were immature and doubtless more sinned against than sinning . . . Why should the boys, misled by her be sacrificed? What sound public policy can be subserved by branding them as felons? . . .

By exclusively holding males criminally liable for consensual teenage sex, the statute creates an arbitrary burden on the rights of males. The arbitrary use of sex as a criteria, however, is not constitutionally permissible. *Reed v. Reed, supra.*

The majority below assumes that pregnancy is similar to a disease which is carried by males who, like "Typhoid Mary", infect others while never contracting the disease themselves. According to the majority, "[t]he Legislature is well within its power in imposing criminal sanctions against males, alone, because they are the *only* persons who may physiologically cause the result which the law properly seeks to avoid." *Michael M.,* supra, 25 Cal.3d 608, 612 [Appendix p.A-5] (emphasis the Court's). Of course, males are not the *only* persons who cause pregnancy. The joint action of *both* a male and a female is ordinarily required. The Court's distortion of this physiological fact is a futile attempt to cling to the stereo-

types embodied in the statute. The Court's opinion is not grounded in medical or legal fact, and should not stand as a statement of Constitutional Law.

The reasoning of the majority below presumes that females as a class are susceptible and therefore need to be defended. The dissent of Justice Mosk aptly criticizes the majority's irrebutable presumption of diminished capability of the female:

> *Because she is a woman* she is deemed inherently less capable of knowing the facts, of controlling her emotions, of weighing the risks and benefits, and of making intelligent choices—in short, she is less responsible for her actions—than her male counterpart. As it presently reads, the California statutory rape law thus reflects a belief that the minor female is in need of special protection not only against the male but also against herself, against her "voluntary" but presumptively imprudent decisions in matters of sex.
>
> Michael M., *supra,*
> 25 Cal.3d 608, 624,
> [Appendix p.A-22, 23]
> (emphasis the court's)

The Court's opinion detracts from the status and the rights of women in the guise of their protection. Although the courts of the past have endorsed this kind of "romantic paternalism",[3] there is no justification for prolong-

---

[3]See, for example, *Muller v. Oregon* (1908), 208 U.S. 412, 421-422, 52 L.Ed. 551, 556, 28 S.Ct. 324, in which it was stated: "[H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength . . . [H]er physical structure and a proper discharge of the maternal functions—having in view not merely her own health, but the well-being of the entire race—justified legislation to protect her from the greed and as well as the passion of man."

ing such antiquated notions. *Frontiero v. Richardson, supra,* 411 U.S. at 684-685. "The pedestal upon which women have been placed has all too often, upon closer examination, been revealed as a cage." *Sail'er Inn v. Kirby* (Cal. 1971), 5 Cal.3d 1, 20, 485 P.2d 529.

The Court's use of pregnancy prevention to justify the discriminatory operation of the statute perpetuates fixed notions about the sexes. The fact that only females become pregnant has been traditionally used a rationalization for sex discrimination. "Certainly the fact that women and not men bear children is a fundamental distinguishing characteristic of the two sexes and as such can be the basis for some gender based legislation; but there is a danger that the very uniqueness of this characteristic makes it an available hindsight catchall rationalization for laws promulgated with totally different purposes in mind." *Meloon v. Helgemoe* (1st Cir., 1977) 564 F.2d 602, 607, cert. denied, 436 U.S. 950, 56 L.Ed.2d 793, 98 S.Ct. 2858.

The Court disputes universally accepted facts in an attempt to rationalize its defense of traditional sex roles. For example, the use of contraceptives was rejected as a defense due to "doubtful efficacy"; "[W]e believe legislators' rejection of the defenses suggested . . . reflect[s] their reluctance to rely, for accomplishment of their antipregnancy objective, upon the doubtful efficacy of contraceptives and the truth of the inevitable claim of nonemission by a male charged with statutory rape." *Michael M., supra,* 25 Cal.3d 608, 613 [Appendix p. A-6] (quoting *State v. Rundlett* (Maine 1978) 391 A.2d 815).

The majority's assumption that contraceptives are ineffective evidences an anachronistic perspective. As pointed out in the dissent of Justice Mosk, "certain pregnancy prevention devices (e.g., condoms and contraceptive pills) are both efficacious and widely available to 17 year old men and women. The majority's disregard of this well-known fact does not make it any less true." *Michael M., supra,* 25 Cal.3d 608, 620 n.3 [Appendix p.A-17]. The assertion that contraceptives are of "doubtful value" is also inconsistent with this Court's recognition of the importance of the right to use and acquire contraceptives. *Carey v. Population Services International,* 431 U.S. 678, 52 L.Ed.2d 675, 97 S.Ct. 2010. *Griswald v. Connecticut,* 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678. The majority opinion is dangerously out of date and contrary to well known medical evidence.

The decision below is based upon assumptions about the roles of the sexes that should not be given judicial sanction. With few exceptions, equal protection requires that the law operate without regard to sex. "A gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny." *Orr v. Orr, supra,* 440 U.S. 268, 282-283. If anything, teenage girls are generally more mature than boys of like age and are therefore at least as responsible as their partners for voluntary sexual intercourse. The decision below which condones such unequal treatment should not be allowed to stand.

II

THE CONSTITUTIONAL VALIDITY OF STATUTORY RAPE LAWS IS A QUESTION OF NATIONAL IMPORTANCE WHICH SHOULD BE DECIDED BY THIS COURT

This Court's determination of the validity of the California statute will help to resolve questions that are certain to be raised in numerous federal Habeas Corpus proceedings as well as in state appellate courts. Statutory rape laws have been recently challenged in nine states[4] and twice in the First Circuit.[5] This pattern of litigation demonstrates that questions concerning the Constitutional validity of statutory rape laws have been the focus of numerous inquiries. The wave of challenges to the various statutory rape laws has been precipitated by the recent decisions of this Court in the realm of sex discrimination. See *State v. Rundlett,* 391 A.2d 815, 817-818, *In Re Interest of J.D.G.,* 498 S.W.2d 786, 793, *Meloon v. Helgemoe, supra,* 564 F.2d 602, 604. Unless this Court decides the issues presented by this case, the surge of challenges to the various statutory rape laws will continue. It is therefore imperative

---

[4]*Michael M. v. Superior Court* (Cal. 1979), 25 Cal.3d 608, 601 P.2d 572, *Olson v. Nevada* (Nev. 1979), 588 P.2d 1018, *State v. Drake* (Iowa 1979), 219 N.W.2d 492, *People v. Fauntleroy* (N.Y. 1978), 405 N.Y.S.2d 931, *Ex Parte Groves* (Tex. 1978), 571 S.W.2d 888, *State v. Rundlett* (Maine 1978), 391 A.2d 815, *State v. Thompson* (N.J. 1978), 392 A.2d 678, *State v. Meloon* (N.H. 1976), 366 A.2d 1176, *In Re Interest of J.D.G.* (Mo. 1973), 498 S.W.2d 786.

[5]*Rundlett v. Oliver* (1st Cir., 1979), 607 F.2d 495, *Meloon v. Helgemoe* (1st Cir., 1977), 564 F.2d 602, cert. denied 436 U.S. 950.

that this Court grant certiorari to resolve these questions of national interest which continue to consume the time and attention of the lower courts.

CONCLUSION

The opinion of the majority is based upon the antiquated sexual myth of the superiority of the male. Such an opinion by the highest court of the most populous state can only help to perpetuate the notion that women are inferior to men, and prolong the struggle for equal rights among the sexes. Questions as to the validity of many forms of statutory rape laws have been raised in numerous courts throughout the nation. This Court should grant certiorari to give constitutional guidance on the issues presented herein.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of California.

Dated: February 27, 1980.

Respectfully submitted,
GREGORY F. JILKA
TERESA DE LA O
Attorneys for Petitioner

(Appendix Follows)

APPENDIX

APPENDIX

[25 Cal.3d 608, 601 P.2d 572]

[S.F. No. 23929, Nov. 5, 1979.]

Michael M. Petitioner, v.
The Superior Court of Sonoma County, Respondent;
The People, Real Party in Interest.

Opinion

RICHARDSON, J.—We consider the constitutionality of Penal Code section 261.5 (all statutory references are to that code unless otherwise cited), which defines the offense of "unlawful sexual intercourse" as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." The crime was formerly called "statutory rape." We will conclude that while this section does classify both victims and offenders by sex, there is a compelling state interest which justifies the classifications, thus meeting the equal protection requirements of both federal and state Constitutions.

The factual and procedural aspects of the case are briefly described. Defendant, 17½ years old, and Sharon, 16, engaged in sexual intercourse after an amorous interlude on a park bench. There was some evidence that the defendant struck Sharon twice before she engaged in the act. After the juvenile court found that defendant was not a fit and proper subject to be dealt with under the juvenile court law (Welf. & Inst. Code, § 707, subd. (a)), he was charged by information with a felony violation of section 261.5. Following his unsuccessful motion to set aside the information under section 995, he seeks from us a writ of

prohibition to compel the respondent superior court to dismiss the information on the ground that section 261.5 violates the equal protection clauses of both the United States and California Constitutions, because only females are protected by the statute and only males may be prosecuted it under it. (§ 999a; (*Rockwell* v. *Superior Court* (1976) 18 Cal.3d 420, 427-428 [134 Cal.Rptr. 650, 556 P.2d 1101].) For reasons developed below we reject this contention.

In *Sail'er Inn, Inc.* v. *Kirby* (1971) 5 Cal.3d 1 [95 Cal. Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351], we considered the issue of suspect classifications based upon sex. Specifically, we there invalidated a statute which prohibited women from tending bar except in certain limited circumstances. Under the strict scrutiny standard routinely applied when the classification is deemed suspect, we imposed upon the state the burden of establishing not only that the state has a *compelling* interest which justifies the law but that those distinctions drawn by the law are necessary to further the statute's purposes. (*Id.*, at pp. 16-17; *Arp* v. *Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 395, 406 [138 Cal.Rptr. 293, 563 P.2d 849]; *Westbrook* v. *Mihaly* (1970) 2 Cal.3d 765, 784-785 [87 Cal.Rptr. 839, 471 P.2d 487].)

There can be no doubt that section 261.5 discriminates on the basis of sex because only females may be victims, and only males may violate the section. However, this obviously discriminatory classfication scheme is readily justified by an important state interest. Unlike the sex-based classification which we invalidated in *Sail'er Inn,* and which reflected overbroad social generalizations regarding the appropriate roles of males and females, the law

herein challenged is supported not by mere social convention but by the immutable physiological fact that it is the female exclusively who can become pregnant. This changeless physical law, coupled with the tragic human costs of illegitimate teenage pregnancies, generates a compelling and demonstrable state interest in minimizing both the number of such pregnancies and their disastrous consequences. Accordingly, the Legislature is amply justified in retaining its historic statutory rape law because of the potentially devastating social and economic results which may follow its violation.

Pregnancies among unwed teenage girls constitute a major contemporary human problem the dimensions of which may be illustrated by a few current statistics. Between 1971 and 1976, 83.6 percent of the 4,860 children born in California to girls under 15 years of age were illegitimate. During this same period, of the 112,682 children born to girls from 15 to 17 years of age, 51 percent were illegitimate. An average of 37.5 percent of births to all teenage mothers from 1971 to 1976 were out-of-wedlock. In contrast, approximately 15 percent of births to women of all ages during a comparable period were illegitimate. (Cal. Dept. of Health Services, Center for Health Statistics, Birth Cohort Records.) We may conclude that the problem of illegitimate births to teenagers is serious.

The fact that most teenage pregnancies are unwanted is evidenced by the fact that teenagers seek and utilize a disproportionate amount of abortion services. While teenagers accounted for 21 percent of all pregnancies in 1976, 48 percent terminated their pregnancies by induced abortion, thus accounting for 34.7 percent of all legal abortions

in California. (*Id.;* see also, Green & Potteiger, Teenage Pregnancy: A Major Problem for Minors (Zero Population Growth Pamp. 1977); 11 Million Teenagers (Alan Guttmacher Institute 1977).)

Furthermore, births to teenage mothers pose substantially increased medical risks as evidenced by the record of complications reported on the birth certificates in one-fourth of recent teenage pregnancies. (Cal. Dept. of Health Services, Center for Health Statistics, Birth Cohort Records, *supra.*) For both the adolescent mother and her infant there is a measurably greater risk of death, illness, or injury than for women in their 20s.

Finally, "The social consequences of teenage childbearing are even more pervasive than the health consequences. Thus, eight out of 10 women who first become mothers at age 17 or younger never complete high school—twice as high a proportion as those who do not give birth until they are 20 or older. A recent study clearly finds that the pregnancy directly causes the dropout, independent of any effect of antecedent education achievement or aptitude." (Lincoln, Is Pregnancy Good for Teenagers? (Alan Guttmacher Institute, U.S.A. Today, July 1978) pp. 34, 36.)

The injurious effects of pregnancy on an unwed teenager are thus substantial, far-reaching, and may well include severe physical, mental and emotional trauma. In our view a responsible Legislature need not blind itself to these serious sociological consequences. Understandably concerned about the scope of these problems it may, in an era of growing permissiveness, choose to meet them in a variety of ways. It may encourage sex education in schools

and provide for the dissemination of relevant educational information and medical attention in the manner described in Civil Code section 34.5. It may also, in our view, properly attack the problem more directly by expressly prohibiting acts of sexual intercourse performed by a male with a female, not the wife of the perpetrator, who is under the age of 18 years.

Once the state has established a valid and compelling interest in preventing pregnancies among unwed teenage girls and further determines to implement that interest, in part, by imposing a criminal sanction proscribing sexual relations with minor females, it inevitably follows that sex is the only possible and therefore *necessary* classification which can be adopted in identifying offender and victim. The Legislature is well within its power in imposing criminal sanctions against males, alone, because they are the *only* persons who may physiologically cause the result which the law properly seeks to avoid.

Defendant contends, however, that even if the prevention of pregnancy is a compelling state interest, the classification scheme of the statute is both overly broad and unnecessary to the protection of the female minor. He suggests that the state's interest in preventing pregnancy could be served equally well by removing from the ambit of the statute, either as female victims or male offenders, all those who use birth control devices or techniques and all those otherwise incapable of procreation. We disagree, adopting in this connection the sound reasoning of the Supreme Judicial Court of Maine in *State* v. *Rundlett* (Me. 1978) 391 A.2d 815, wherein, responding to a similar argument, it recently said, "We doubt that legislators, intent

on use of the criminal law to prevent juvenile pregnancies, would throw such a roadblock in the way of effective prosecution as would be created by subjecting an under-age prosecutrix to cross-examination of such additionally embarrassing and uncertain details. Furthermore, we believe legislators' rejection of the defenses suggested . . . reflect[s] their reluctance to rely, for accomplishment of their anti-pregnancy objective, upon the doubtful efficacy of contraceptives and the truth of the inevitable claim of non-emission by a male charged with statutory rape." (P. 821, fn. 18.)

We also are unable to accept the contrary argument that the statue is impermissibly *underinclusive* and must, in order to pass constitutional muster, be *broadened* so as to hold the female equally culpable. It is the prerogative, indeed the duty, of the Legislature to recognize degrees of culpability when drafting a Penal Code. It follows that the Legislature may reasonably conclude that the minor female who engages, however willingly, in sexual relations is subjected to risks and adverse consequences, both prenatal and postnatal, albeit of another kind, far greater than those which may befall her male counterpart. To hold otherwise defies not only common sense and reality, but the fundamental laws of biology.

We note that *all* minors, male and female, are protected from sexual abuse under sections 272 (contributing to the delinquency of a minor) and 288 (lewd and lascivious conduct upon the body of a child under 14). Women may be prosecuted under these statutes if they engage in sexual relations with underage males. (See *People* v. *Mackey* (1975) 46 Cal.App.3d 755, 760 [120 Cal.Rptr. 157].) Sec-

tion 261.5 merely provides additional protection for minor females in recognition of the demonstrably greater injury, physical and emotional, which they may suffer.

We find significance in the fact that in all of jurisprudence the only case upon which defendant can rely for his constitutional challenge is *Meloon* v. *Helgemoe* (1st Cir. 1977) 564 F.2d 602. But *Meloon,* as even the most cursory reading reveals, involved a statutory scheme under which it was declared to be a felony for a male to have consensual relations with a female under the age of 15, while it was not a crime *of any kind* for a woman to have consensual sexual relations with a male under 15. (P. 603.) It thus becomes apparent that the *Meloon* court was called upon to evaluate a statutory scheme quite different from that before us.

Furthermore, the Legislature may well have believed that the criminal prosecution of a minor female equally with a male would, as a practical matter, effectively eliminate any possibility whatever of prosecution under the statute. A potential prosecutrix, or her family, would be unlikely ever to complain if she would herself be subject to a prosecution on identical charges. Because the Legislature has enacted this legislation with the principal objective of protecting minor females as a class it is not surprising that it simultaneously elected to exclude the victim herself from the statutory proscription.

We emphatically reject defendant's contention that to uphold the constitutionality of section 261.5 necessarily creates adverse inferences concerning the capacity of minor females to make intelligent and volitional decisions. By its

adoption of section 261.5 the Legislature necessarily acknowledged the obvious truism that minor females are fully capable of freely and voluntarily consenting to sexual relations. If this was not so, the charge brought in these cases would uniformly be one of forcible rape. (§ 261.) The statute makes no statement about the girl's ability to consent. Rather, the statute merely prohibits the act of sexual intercourse with an underage female not the wife of the perpetrator rejecting consent as a defense. In this regard section 261.5 is no different than a variety of other statutes which prohibit minors from engaging in certain activities of much less consequence to the minor, no matter how well informed, how knowledgeable and how willing or consenting the minor might be. (E.g., §§ 308 [selling or furnishing tobacco to minor], 310 [minor under 16 may not attend prizefight], 326.5 [no minor may participate in bingo game].)

It is quite possible that the Legislature, if it so elected, could adopt a gender-neutral statute prohibiting sexual relations with minors of *either* sex, or it might, in some other way, modify the present statute in accordance with defendant's urgings. However, the Legislature is not constitutionally compelled to do so, and thus far for reasons satisfying to itself has not done so. Furthermore, we note that in all of those states which assertedly have adopted a neutral rule, the change was effected in every instance by *legislative action.* Not a single state has adopted such a rule by *judicial* decree.

The petition for writ of prohibition is denied.

Bird, C.J., Clark, J., and Manuel, J., concurred.

MOSK, J.—I dissent.

I cannot subscribe to the implied premise of the majority that the female of the human species is weak, inferior, and in need of paternalistic protection from the state. That concept is an anachronism in a society in which females have achieved remarkable progress toward equality. The tutelary syndrome of Victorian days has yielded to a new era in which women are contributing their talents in every field of endeavor—as prime ministers, governors, legislators, judges, corporate executives, lawyers, scientists, medical doctors, police officers, and professional athletes.

In this modern context, I conclude that Penal Code section 261.5, which defines "unlawful sexual intercourse" as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years," creates a classification by sex that is impermissible under our decision in *Sail'er Inn* v. *Kirby* (1971) 5 Cal.3d 1 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R. 3d 351], and violates the equal protection guarantee of article I, section 7, subdivision (a), of the California Constitution.

The majority gloss quickly over the facts of this case. Yet they illustrate once again the fundamental unfairness of a law that always punishes the young man and never the young woman for a joint act of which she was often equally the cause.

At the time of the incident the defendant herein, Michael, was 17½ years old; the so-called "victim," Sharon was only 1 year and 18 days younger than he. On the evening in question, Sharon and her 21-year-old sister bought half

a pint of whiskey and 2 Pepsi-Colas to use as mixers. After making this purchase they walked to a bus stop; Michael and two other male youths rode by on their bicycles, then returned and asked the girls if they would like to drink some wine. The girls replied affirmatively, and accompanied the boys to the railroad tracks. The group drank while walking to the tracks, and continued to do so on arrival. Sharon and Michael then went into the bushes, lay down, and began kissing and hugging for half an hour. They were interrupted by Sharon's sister, who asked Sharon if she was ready to leave. Sharon replied that she was not, and her sister left with one of the other boys. With remarkable impartiality, and on her own initiative, Sharon then began kissing the third boy. After he too departed, Sharon and Michael went to a park, lay down on a bench, and resumed their sexual activities. In due course Michael told Sharon to remove her pants, and when at first she demurred he allegedly struck her twice. Sharon testified she then said to herself, "Forget it," and decided to let him do as he wished. The couple then had intercourse.

I

Defendant contends that Penal Code section 261.5 denies him equal protection of the laws under the California Constitution. The majority concede, as they must, that the statute discriminates on the basis of sex because it punishes males who engage in consensual sexual intercourse with females under the age of 18, but not females who perform the same act with males under the age of 18. Accordingly, as the majority further concede, we must carefully scrutinize section 261.5 to determine whether the governmental

interest it serves is sufficiently compelling to justify it under the equal protection clause. This determination requires us to examine not only the nature of the interest sought to be promoted, but also the extent to which the statute is narrowly tailored to achieve that objective. (*Sail'er Inn, Inc.* v. *Kirby* (1971) *supra,* 5 Cal.3d at pp. 16-17; *Arp* v. *Workers' Comp. Appeals Bd.* (1977) 19 Cal. 3d 395, 406 [138 Cal.Rptr. 293, 563 P.2d 849].)

The Attorney General proposes, and the majority adopt his suggestion, that a general governmental interest in reducing pregnancies among unwed teenage girls be invoked to justify the sexual discrimination of section 261.5. In support the majority recite the obvious—that only females can conceive and bear children—and rely on studies showing that illegitimate teenage pregnancies are a significant medical and social problem today.

I do not underestimate the dimensions of that problem. But in analyzing suspect sexual classifications we must not be misled by appearances: we must determine whether the justification asserted for upholding the statute can legitimately be identified as among its actual purposes, or whether instead the classification is in fact a product of traditional sexual stereotypes and hence conflicts with the equal protection clause. (*Arp, supra,* at pp. 404-406 of 19 Cal.3d.) As Justice Richardson explained for a unanimous court in *Arp* (*id.* at p. 404), "We do not feel compelled to accept without inquiry 'the mere recitation of a benign, compensatory purpose,' particularly when that purpose is 'not at all self-evident' and in fact seems historically improbable," quoting *Weinberger* v. *Wiesenfeld* (1975) 420

U.S. 636, 648 [43 L.Ed.2d 514, 525, 95 S.Ct. 1225], and *Craig* v. *Boren* (1976) 429 U.S. 190, 199, footnote 7 [50 L.Ed.2d 397, 408, 97 S.Ct. 451.] This is because the mere recitation of a benign purpose "is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." (Fn. omitted; *Weinberger, supra*, at p. 648 of 420 U.S. [43 L.Ed.2d at p. 525].)

Neither the Attorney General nor the majority offer any support for their theory that the prevention of pregnancy is or even was among the purposes of section 261.5, and both the history and wording of the staute lead to a contrary conclusion. As presently codified the section proscribes the conduct commonly referred to as statutory rape. The modern prohibition against this conduct dates back to the Statutes of Westminster enacted during the reign of Edward I at the close of the 13th century. (3 Edw. 1, ch. 13 (1275); 13 Edw. 1, ch. 34 (1285); see 4 Blackstone, Commentaries 212.) The age of consent at that time was 12 years, and in 1576 it was reduced by statute to 10. (18 Eliz. 1, ch. 7, § 4.) The latter statute was held to be part of the common law of England that was brought to the United States. (Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape* (1965) 64 Mich.L. Rev. 105, 110.) Its purpose was simply to prohibit sexual intercourse with the underage female because she was believed to be "too young to understand the nature and quality of her act" (*ibid.*) and hence incapable of intelligently consenting thereto. The common law is devoid of any evidence that statutory rape law was intended to prevent such females from becoming pregnant.

Statutory rape law in California had its origin in a provision of our first penal statute (Stats. 1850, ch. 99, § 47, p. 234), subsequently reenacted as section 261, subdivision 1, of the Penal Code of 1872. These early statutes proscribed sexual intercourse with females under the age of 10, thereby following the English statute of 1576. In 1889, the California statute was amended to make the age 14. (Stats. 1889, ch. 191, § 1, p. 223.) In 1897, the age was advanced to 16. (Stats. 1897, ch. 139, § 1, p. 201.) And in 1913 it was fixed at 18, where it now remains. (Stats. 1913, ch. 122, §1, p. 212.)

In light of its origins surely it is at least "historically improbable" (*Arp, supra,* at p. 404 of 19 Cal.3d) that the purpose of the statute was prevention of pregnancy. As first enacted, the statute made punishable "Every person of the age of fourteen years and upwards, who shall have carnal knowledge of any female child under the age of ten years, either with or without her consent" (Stats. 1850, ch. 99, § 47, p. 234). It is a known and indisputable fact—of which we are therefore bound to take judicial notice (Evid. Code, § 451, subd. (f))—that because of physiological immaturity the chances that a child of nine years of age or younger can be impregnated are essentially nil. As the majority put it in another context, "To hold otherwise defies not only common sense and reality, but the fundamental laws of biology." (*Ante,* p. 613.)

The true intent of the Legislature in adopting the California statutory rape law, rather, is revealed in the draftsmen's notes to the Penal Code of 1872. Echoing the view of the common law and citing Blackstone, the draftsmen explained that "This provision embodies the well settled

rule of the existing law; that a girl under ten years of age is *incapable of giving any consent* to an act of intercourse which can reduce it below the grade of rape." (Italics added.) (Code commissioners' note, subd. 1, foll. Pen. Code, § 261 (1st ed. 1872) p. 111.) There was no mention whatever of pregnancy prevention.

Nor does the gradual increase in the age of consent between 1889 and 1913 provide a legitimate basis for inferring that pregnancy prevention ever became a goal of the statute. To begin with, under the strict scrutiny test admittedly controlling here it is the state's burden to demonstrate that such changes in the law support its claim of the legislative purpose. But that burden is not and cannot be met. The Attorney General fails to provide us with any reason for these amendments, less still to show they relate in the slightest degree to the age at which a female can conceive. And it could not credibly be asserted that during the period in question, by successive increments of four, two, and two years, the age of female puberty in California rose from ten to eighteen. Again we must take judicial notice of a known and indisputable fact, to wit, that young women are physiologically mature well before they reach their 18th birthday. Thus just as the age of nine is too low for the majority's theory, eighteen is too high: the statute simply cannot be made to fit the pregnancy prevention rationale.

In any event, a far more plausible explanation for these amendments of the statute appears from other legislative history: the age defining this offense was undoubtedly increased because popular views changed both with regard

to the suitable age of women for marriage and the age until which they were deemed appropriately subject to protective legislation. Thus section 56 of the Civil Code of 1872 fixed 15 as the age at which a female could marry without parental consent, but in 1921 the age was raised to 18. (Stats. 1921, ch. 233, § 1, p. 333 [now see Civ. Code, § 4101, subd. (a)].)[1]

Moreover, even after the age of consent had been raised to a level at which conception became biologically possible, this court continued to declare that "The obvious purpose of [the statutory rape law] is the protection of society by protecting from violation the *virtue* of young and unsophisticated girls." (Italics added.) (*People* v. *Verdegreen* (1895) 106 Cal. 211, 214 [39 P. 607]; see also *People* v. *Lourintz* (1896) 114 Cal. 628, 630 [46 P. 613].) Indeed, the court in *Verdegreen* considered the statutory purpose of protecting the virtue of inexperienced young girls to be so pervasive that it held "advances" made with intent to commit statutory rape could constitute an assault to commit that offense. It stated: "It is the insidious approach and vile tampering with their persons that primarily undermines the virtue of young girls, and eventually destroys it, and the prevention of this, as much as the principal act, must undoubtedly have been the intent of the legislature. The incapacity extends to the act and all its incidents." (106 Cal. at p. 215.) Such "approach" and "tampering," of course, cannot result in pregnancy.

---

[1]A similar evolution occurred with respect to the minimum age at which minors were protected by child labor laws from industrial exploitation and injury. (See, e.g., Stats. 1905, ch. 18, p. 11; Stats. 1919, ch. 259, p. 415; Stats. 1937, ch. 90, § 1290 et seq., p. 219 et seq. [now Lab. Code, § 1290 et seq.].)

Finally, we recognized the same purpose of the statute —to protect the virtue of young girls—long after the age was raised to 18. In the landmark decision of *People v. Hernandez* (1964) 61 Cal.2d 529, 531 [31 Cal.Rptr. 361, 393 P.2d 673, 8 A.L.R.3d 1092], we stated that the statutory rape law conclusively assumes the under-age female incapable of giving informed consent to sexual intercourse because "she is presumed too innocent and naive to understand the implications and nature of her act. [Citations.] The law's concern with her capacity or lack thereof to so understand is explained in part by a popular conception of the social, moral and personal values which are preserved by the abstinence from sexual indulgence on the part of a young woman. An unwise disposition of her sexual favor is deemed to do harm both to herself and the social mores by which the community's conduct patterns are established. Hence the law of statutory rape intervenes in an effort to avoid such a disposition." Again there was no mention of pregnancy prevention; and the majority point to no legislative history since the date of *Hernandez* to support their repudiation of that unanimous decision's reading of the statutory purposes.[2]

The language of section 261.5 confirms the lessons of its history. The statute makes no attempt to define culpability in terms of sexual intercourse that creates a risk of pregnancy. It does not permit a defense that the couple

---

[2]It is true that in 1970 the Legislature separated the prohibition against statutory rape from the forcible rape provisions of Penal Code section 261, and recodified it as "unlawful sexual intercourse" in section 261.5 (Stats. 1970, ch. 1301, § 2, p. 2406.) But the recodification in no way changed the definition of the offense, and the majority do not claim it had any substantive significance.

used contraceptives or employed other pregnancy prevention techniques, even in cases in which the method of contraception is extremely effective.[3] Nor does the statute make any exception for cases in which either the male or female is sterile, or emission did not occur; yet emission is not a prerequisite to conviction, for "Any sexual penetration, however slight, is sufficient to complete the crime." (Pen. Code § 263; see, e.g., *People* v. *Howard* (1904) 143 Cal. 316, 317 [76 P. 1116].) Finally, since *all* girls under the age of 18 fall within its scope, the statute punishes intercourse with a substantial number for whom, as noted above, conception is a sheer impossibility simply because of physiological immaturity.

In short, reducing illicit pregnancies among teenage girls may well be a laudable government objective, but it is wishful thinking to believe that the California statutory rape law was actually enacted or reenacted for the purpose. Under the cases cited at the outset, therefore, it may not properly be invoked to save the statute. (See, e.g., *Arp,* at p. 404 of 19 Cal.3d; *Weinberger,* at p. 648 of 420 U.S. [43 L.Ed.2d at p. 525].)

II

Even if section 261.5 were actually intended to prevent pregnancy, its classification scheme nevertheless remains

---

[3]On this point the majority simply adopt the reasoning of *State* v. *Rundlett* (Me. 1978) 391 A.2d 815, 821, footnote 18, which is premised inter alia on the claimed "doubtful efficacy of contraceptives" (*ante,* p. 613). Here again reality is otherwise: certain pregnancy prevention devices (e.g., condoms and contraceptive pills) are both efficacious and widely available to 17-year-old men and women. The majority's disregard of this well-known fact does not make it any less true.

constitutionally deficient. The conduct that creates the risk of pregnancy is an act of sexual intercourse in which *both* the male and the female participate. The act may have been solicited by the male, by the female, or simultaneously by both, and by definition it was wholly consensual. Thus when both parties participate in the decision to engage in the sexual act, each must be presumed equally responsible if pregnancy results.[4] Yet the statute, if it seeks to reduce pregnancy among unwed teenage girls, does so by punishing only the male for his part in this joint conduct. Although it is true that biologically only females can become pregnant, no compelling justification has been offered for holding the male but not the female criminally responsible for the same act. The statute is therefore impermissibly underinclusive. (See, e.g., *Tatro* v. *State* (Miss. 1979) 372 So.2d 283 [statute making it a felony for a male but not a female to sexually fondle a child under 14, held to violate equal protection]; *Commonwealth* v. *MacKenzie* (1975) 368 Mass. 613 [334 N.E.2d 613] [statute making it a misdemeanor for father but not mother to beget a child out of wedlock, held to violate equal protection]; *Lamb* v. *Brown* (10th Cir. 1972) 456 F.2d 18 [statute giving females under 18 the benefit of juvenile court proceedings but limiting those same benefits to males under 16, held to violate equal protection].)

---

[4]The section cannot be sustained on the ground that it protects minor females from being unwittingly persuaded to engage in the act by more sophisticated adult males because, as long as the female is under the age of 18, the male can be punished even if he is the same age or younger than the female. Defendant herein, for example, is virtually the same age as the complaining witness.

The majority's arguments to the contrary are demonstrably inadequate. The majority first posit that it is the Legislature's prerogative to recognize "degrees of culpability" when drafting criminal laws. (*Ante,* p. 613.) But the majority then fall into a complete non sequitur when they find it "follows" therefrom (*ibid.*) that the Legislature may reasonably believe that because of the possibility of pregnancy, the female runs greater medical and social risks in sexual intercourse than the male. Of course she runs greater risks if adequate contraceptive measures are not taken; but they are the consequences rather than the causes of her act, and are therefore wholly irrelevant to weighing her moral blame in committing the act in the first place. In our system of justice, offenders are not deemed less cupable merely because they may suffer additional punishment from sources outside the legal system. For example, an outwardly respectable person who engages in illicit drug activity is not rendered less blameworthy when his arrest and conviction for that conduct also result in social ostracism and loss of professional status.

Secondly, the majority reason that because minors are protected from sexual abuse by certain other provisions of law (Pen. Code, §§ 272, 288), section 261.5 "merely provides additional protection for minor females in recognition of the demonstrably greater injury, physical and emotional, which they may suffer." (*Ibid.*) This is another non sequitur. Neither of the statutes relied on by the majority draws any distinction based on sex: section 272 punishes "Every person" who contributes to the delinquency of "any person under the age of 18 years," while section 288 punishes "Any person" who commits lewd or

lascivious acts upon "a child under the age of 14 years." The fact that those statutes are gender-neutral does not somehow give the Legislature the right to enact an "additional" law on the topic that invidiously discriminates on sexual grounds.

Finally, the majority argue that a potential prosecutrix or her family would be unlikely to complain if she were herself subject to prosecution, and hence the inclusion of women in the statutory proscription would as a practical matter "effectively eliminate any possibility whatever of prosecution under the statute." (*Ante,* p. 614.) Surely this is an exaggeration. The testimony of the female participant is not, as the majority assume, the sole evidence of the offense in every case. Even if it were, the district attorney obviously has discretion not to file charges against her. Further, if she remains diffident about testifying to the offense in question, she can simply be granted immunity from prosecution. (Pen. Code, § 1324; see also §§ 1099, 1101 [discharge to be a witness for the prosecution].)

The majority's concern in this regard, moreover, is evidently not shared by the legislatures of our sister states. At least 31 jurisdictions now prohibit sexual intercourse with underage persons of either sex.[5] The majority belabor the

---

[5]Alaska (Alaska Stat., § 11.15.120 (Cum. Supp. 1978)); Arizona (Ariz. Rev. Stat., §§ 13-1404, 13-1405 (1978)) Arkansas (Ark. Stat. Ann, §§ 41-1803, 41-1804, 41-1806 (1977)); Colorado (Colo. Rev. Stat., § 18-3-403 (Cum. Supp. 1976)); Connecticut (Conn. Gen. Stat., § 53a-71 (1977)); Florida (Fla. Stat. Ann., §§ 794.011, 794.05 (West 1976)); Illinois (Ill. Stat. Ann., ch. 38, §§ 11-5, 11-6 (Smith-Hurd Supp. 1978)); Indiana (Ind. Code Ann., § 35-42-4-3 (Burns Cum. Supp. 1978)); Iowa (Iowa Code Ann., §§ 709.1-709.4 (West Supp. 1978-1979)); Kansas (Kan. Stat. Ann., § 21-3503 (Cum. Supp. 1978)); Kentucky (Ky. Rev. Stat. Ann., § 510.040 (Baldwin 1975)); Louisiana (La. Rev. Stat. Ann., § 14:42 (West Supp.

obvious when they emphasize that in each of the cited jurisdictions the change from traditional statutory rape law to a sex-neutral classification was accomplished by legislative rather than judicial reform. But the fact that the reform has taken place on such a large scale is itself significant for two reasons. First, it refutes the majority's argument that it is necessary to exclude minor females from the statutory proscription in order to insure its enforcement: in every jurisdiction in which statutory rape is now defined as sexual intercourse by a "person" with a "person" who is under age (see, e.g., Me. Rev. Stat. Ann. tit. 17A, § 252, quoted in *State* v. *Rundlett* (Me. 1978) *supra,* 391 A.2d 815, 816, fn. 2), the minor female in a case such as the one before us would be equally punishable with the minor male. Secondly, and more broadly, the reform demonstrates the widespread belief of our sister states that the purposes of gender-based statutory rape laws—such as those previously

---

1978)); Maine (Me. Rev. Stat. Ann., tit. 17A, §§ 252, 254 (West Supp. 1978)); Maryland (Md. Crim. Law Code Ann., art. 27, §§ 463, 464A, 464B (Cum. Supp. 1978)); Massachusetts (Mass. Ann. Laws, ch. 265, § 23 (Michie/Law. Co-op Supp. 1979)); Michigan (Mich. Stat. Ann., § 28.788(2) (Cum. Supp. 1978-1979)); Minnesota (Minn. Stat. Ann., §§ 609.342-609.345 (West Supp. 1979)); Montana (Mont. Rev. Code Ann., §§ 94-5-501, 94-5-503 (1977)); Nebraska (Neb. Rev. Stat., § 28-403.03 (1975)); New Hampshire (N.H. Rev. Stat. Ann., §§ 632-A:2, 632-A:3 (Supp. 1975)); New Mexico (N.M. Stat. Ann., §§ 40A-9-21, 40A-9-23 (Supp. 1975)); North Dakota (N.D. Cent. Code, §§ 12.1-20-03, 12.1-20-05, 12.1-20-07 (Supp. 1977)); Ohio (Ohio Rev. Code Ann., §§ 2907.02, 2907.04 (Page 1975 & Supp. 1978)); Pennsylvania (Penn. Stat. Ann., tit. 18, § 3122 (Purdon Supp. 1978-1979)); South Carolina (S.C. Code, § 16-3-655 (1978)); South Dakota (S.D. Compiled Laws Ann., § 22-22-1 (Supp. 1978)); Vermont (Vt. Stat. Ann., tit. 13, § 3252 (Cum. Supp. 1978)); Washington (Wash. Rev. Code Ann., §§ 9.79.200, 9.79.210, 9.79.220 (1977)); West Virginia (W.Va. Code, §§ 61-8B-2, 61-8B-3, 61-8B-5 (1977)); Wisconsin (Wis. Stat. Ann., § 940.225 (West Supp. 1978-1979)); Wyoming (Wyo. Stat., §§ 6-63.3, 6-63.4 (Interim Supp. 1977)).

in effect in the cited jurisdictions—can be just as effectively served by gender-neutral statutes on the same subject.

The majority conclude (*ante*, p. 614) by flatly denying that section 261.5 reflects adversely on "the capacity of minor females to make intelligent and volitional decisions" on the question of whether to be sexually active. It is true the section does not reflect on their capacity to make *volitional* decisions on the topic, and indeed it presumes the existence of that very ability. But it is no less true that the statutory rape law impugns the capacity of underage women to make such decisions *intelligently.*

The majority purport to find section 261.5 no different in this regard from other provisions of law prohibiting minors from engaging in specified activities regardless of consent. Once again, however, in each such instance the law is gender-neutral and applies equally to minors of both sexes. (See Pen. Code §§ 308, 310, 326.5.) By contrast, although the present statute posits that both sexes are capable of consenting to sexual intercourse, it denies females the right to do so. Even if the purpose of the statute were pregnancy prevention, therefore, its practical effect is to perpetuate the age-old stereotype we recognized in *Hernandez* (at p. 531 of 61 Cal.2d), i.e., that the underage female "is presumed too innocent and naive to understand the implications and nature of her act." As seen by the public in actual operation, section 261.5 assumes that when the minor female "volitionally" decides to be sexually active, she does not really know what she is doing. *Because she is a woman* she is deemed inherently less capable of knowing the facts, of controlling her emotions, of weighing the risks and benefits, and of making intelligent choices—

in short, she is less responsible for her actions—than her male counterpart. As it presently reads, the California statutory rape law thus reflects a belief that the minor female is in need of special protection not only against the male but also against herself, against her "voluntary" but presumptively imprudent decisions in matters of sex.[6]

Such notions are obviously vestiges of a bygone era, remnants of the exploded myth of intrinsic male superiority. They are the product of conventional sex-stereotypical thinking, and revive an outmoded patriarchial view of "the woman's role." Certainly it is permissible for the Legislature to enact statutes for the protection of the moral character of minors of both sexes, and in particular to prevent their sexual exploitation by persons older and more mature than they, but absent a compelling reason for doing so, equal protection forbids the law to foster one standard of socially acceptable conduct for males and another for females. By limiting the definition of the crime "to situations in which the offender is a male and the victim a female, [statutory rape laws] are providing only an incomplete and unsatisfactory protection. At the same time, they are lending their support to society's pernicious and hypocritical double standard of sexual morality." (Kanowitz, Women and the Law (1969) p. 25.) Such considerations not only fail to justify the discrimination of section 261.5, they reinforce the argument for holding it unconstitutional.

---

[6]Among other consequences of this belief is the absurdity by which a man can be convicted of statutory rape when he has consensual sexual intercourse with an underage but *married* woman. (See, e.g., *People* v. *Caldwell* (1967) 255 Cal.App.2d 229 [63 Cal. Rptr. 63, 32 A.L.R.3d 1026]; *People* v. *Courtney* (1960) 180 Cal. App.2d 61 [4 Cal.Rptr. 274].)

Central to the equal protection clause is the principle that each individual, regardless of sex, is to be treated as an equal, fully participating, and responsible member of society. (See Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment* (1977) 91 Harv.L.Rev. 1.) When a legislative classification perpetuates sexual stereotypes it imposes inequalities that stigmatize women and thereby undermine this principle of equal citizenship. As the United States Supreme Court recently explained in striking down a statutory scheme providing that husbands but not wives may be required to pay alimony upon divorce, "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection, [Citation.] Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex." (*Orr* v. *Orr* (1979) ..... U.S. ....., ... [..... L.Ed.2d ....., ..., 99 S.Ct. 1102, 1113].)

I would issue the writ of prohibition.

Tobriner, J., and Newman, J., concurred.

MINUTES

San Francisco, December 5, 1979.

S.F. 23929—Michael M., Petitioner, v. The Superior Court of Sonoma County, Respondent; People, Real Party in Interest. [25 Cal.3d 608]. Petitioner's petition for rehearing denied. Tobriner, J., and Mosk, J., are of the opinion the petition should be granted.